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FEDERAL COMMUNICATIONS COMMISSION  
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BEFORE THE

**Federal Communications Commission**

WASHINGTON, D.C. 20554

In re Application of

GAF BROADCASTING COMPANY

For Renewal of the License  
of FM Broadcasting Station WNCN  
New York, New York

MM Docket No. 93-54

File No. BRH-910201WL

To: The Review Board

**OPPOSITION TO MOTION TO ENLARGE ISSUES**

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DATED: October 20, 1993

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## SUMMARY

The Guild, a nonparty which has already buried the Commission and GAF in an avalanche of meritless petitions and appeals, now seeks EEO, securities fraud and reporting issues against GAF. Initially, its Motion should be dismissed summarily under Section 1.229(a) of the rules because the Guild was not a party to this comparative renewal hearing, and its requests to be named a party were repeatedly rejected. A nonparty has no standing to seek addition of issues.

The Guild first seeks an age discrimination issue, based upon a pending lawsuit filed in New Jersey state court by WNCN's former General Manager, Matthew Field. This request must fail because it does not allege any violation of the FCC's broadcast EEO rule, which does not encompass claims of age discrimination. Indeed, in a recent case the Commission granted the contested renewal of a New York television licensee, without hearing, despite an adjudication of age discrimination against it.

Moreover, even if the Guild's claim was material under the FCC rules, it is not cognizable because there has been no adjudication of age discrimination against GAF in the appropriate forum, the state court chosen by Field. Indeed, GAF has contested Field's claim and filed a counterclaim. Pursuant to its EEO and character policies, the Commission does not investigate claims of employment discrimination, or unadjudicated allegations of non-FCC misconduct, pending before another more appropriate forum. Rather, where there is a final adjudication against the licensee, the Commission will then consider the impact on the licensee's qualifications. Indeed, just last year the Commission refused to order a hearing based upon an unadjudicated allegation of age discrimination made by the Guild against GAF. That decision should be dispositive here. In addition, consideration of an EEO issue

by the Board would contravene the clear directive of the Hearing Designation Order in this proceeding that all EEO allegations be resolved by the Commission's EEO Branch, as both the Presiding Judge and Board have previously recognized.

The Guild's request for an issue to determine whether GAF engaged in "fraudulent and deceptive acts," again based on Mr. Field's pending suit, rests on state law allegations which are irrelevant and immaterial under the FCC's character policy. Even if the matters alleged by Field were relevant under the character policy, they would not be cognizable because there has been no adjudication. There is simply no reason for the Commission to resolve the state law claims of a disgruntled former employee, who has filed suit challenging the amount of severance payment and the terms of his stock subscription agreement, which are pending before the state court along with GAF's counterclaim.

Finally, the Guild's request for a reporting issue is similarly meritless. GAF did, voluntarily, file an amendment to report Field's lawsuit, although Section 1.65 of the FCC rules did not require it to do so because neither the Commission's broadcast EEO rule nor character policy encompasses age discrimination. Field's complaint is clearly not of decisional significance, because no rule violation has been shown, the Commission does not investigate pending EEO claims in any event, and the short delay in filing will not prevent full consideration of the amendment by the FCC's EEO Branch (which was served with a copy). The Guild does not even claim an intent to conceal, and has shown no other alleged reporting violation, let alone a pattern.

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To: The Review Board

**OPPOSITION TO MOTION TO ENLARGE ISSUES**

GAF Broadcasting Company, Inc. ("GAF"), the licensee of WNCN(FM), New York, New York, by its attorneys and pursuant to Sections 1.229 and 1.294(c) of the FCC rules, hereby opposes the Motion To Enlarge Issues filed on October 8, 1993 by the Listeners' Guild, Inc. (the "Guild"). The Guild, a nonparty, which has already buried the Commission and GAF in an avalanche of meritless petitions and appeals, now seeks EEO, securities fraud and reporting issues against GAF. As detailed herein, the Guild's issues request is little more than a rehash of the same tired, vacuous arguments which have repeatedly been rejected. Moreover, this most recent attack on GAF by the Guild contravenes clear and well-established FCC policies, which the Commission has only recently reaffirmed in response to other Guild petitions. The Guild's latest desperate attempt to defer GAF's recent renewal grant must be rejected.

I. The Guild Has No Standing To File A Motion To Enlarge.

Initially, the Guild's Motion should be dismissed summarily because the Guild is not a party, and never has been, in the proceeding to which it now seeks to add issues. Section 1.229 of the FCC rules, referenced by the Guild, only authorizes a "party to a hearing" to seek the addition of issues. 47 C.F.R. Sec. 1.229(a). But the Mass Media Bureau, Presiding Judge, Review Board and Commission have all rejected the Guild's attempts to be named a party while this proceeding was pending.<sup>1</sup> This proceeding has since been terminated due to the voluntary dismissal of the only remaining competing applicant. Thus, the Guild not only lacks standing to seek issues, there is no longer a comparative proceeding in which the Guild can seek issues.

The Guild asserts that by "long familiarity" with WNCN, it is "well qualified" to "assist" the Commission with regard to its claims. The Guild, which fails to describe itself, it is a non-profit corporation which claims to represent certain listeners of WNCN(FM) who object to GAF's efforts to update the station's image and broaden the audience for its classical music format.<sup>2</sup> For nearly 20 years, the Guild has brought an incessant stream of unsuccessful attacks against the licensees of WNCN before the Commission, including three renewal challenges. The Guild has buried the Commission, Court of Appeals and GAF with

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<sup>1</sup>See GAF Broadcasting Company, Inc., 8 FCC Rcd 1742 (ASD 1993); Memorandum Opinion and Order, FCC 93M-360, ALJ Chachkin, released June 15, 1993, at ¶ 2-4; Memorandum Opinion and Order, FCC 93-385, released August 16, 1993, at ¶ 8 (appeal pending); and Memorandum Opinion and Order, FCC 93R-50, released September 13, 1993, at ¶¶ 4-5 (application for review pending).

<sup>2</sup>The Guild's Motion fails to name a single member who listens to WNCN, however, and thus has failed to demonstrate that it is a party in interest.

its vexatious and frivolous petitions. At present, the Guild already has pending or has announced its intention to file all of the following: (1) two appeals before the U.S. Court of Appeals for the D.C. Circuit of its unsuccessful attacks on WNCN; (2) the present Motion to Enlarge before the Review Board; (3) an intervention request before the Review Board; (4) an appeal to the Review Board of the ALJ's order terminating this comparative renewal proceeding, to which it was never a party, and indeed has repeatedly been denied party status; (5) an application for review of an order denying its earlier issues and intervention requests, before the Commission; and (6) allegations concerning a previous amendment to GAF's EEO record before the EEO Branch. As detailed herein, the Guild's present Motion is yet another meritless attack in its unrelenting campaign of harassment against WNCN.

II. There Is No Basis For An EEO Issue Based On Unadjudicated Allegations Of Age Discrimination.

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The Guild first requests an issue to determine whether GAF engaged in age discrimination in connection with the termination of its former General Manager and others. This allegation stems from the fact that on July 22, 1993, the former General Manager of WNCN, Matthew Field, brought suit in New Jersey state court against GAF's parent company and two of its officers. The suit, which arose from the termination for cause of Field and an ensuing dispute over the payment he would receive under a stock subscription agreement, includes a count of age discrimination under state law. The Guild's Motion also contains a declaration from Field, in which he repeats his claim of age discrimination.

Initially, the Guild has failed to allege any violation of the FCC's broadcast EEO rule, which does not encompass claims of age discrimination. See 47 C.F.R. Sec. 73.2080(a). In WPIX, Inc., 68 RR 2d 985 (VSD 1990), the Commission granted the

contested renewal of a New York television licensee, without hearing, despite an adjudication of age discrimination against it in a jury trial. Indeed, it specifically found that WPIX had complied with Section 73.2080 and FCC EEO policies. The Commission concluded that "WPIX's adjudicated violations constitute non-FCC misconduct and that they do not fall within the ambit of relevant, non-FCC misconduct contemplated by the Commission." 68 RR 2d at 988-89. Significantly, WPIX had been adjudicated to have violated not only the Age Discrimination in Employment Act, but also the National Labor Relations Act and New York State labor law, and had been cited for six OSHA violations. Thus, Commission precedent mandates a refusal to designate a hearing issue even if there had been an actual adjudication of age discrimination, let alone the bare unadjudicated allegations cited by the Guild here.

Even if the FCC's EEO rules or character policy did encompass age discrimination, the Guild's petition must necessarily fail because there has been no adjudication of age discrimination against GAF in the appropriate forum, in this case the state court. Pursuant to its EEO policy, the Commission does not investigate individual claims of employment discrimination in the first instance, but may later take action based upon any adverse determination by the appropriate forum.<sup>3</sup> Similarly, pursuant to its character policy, the Commission does not investigate allegations pending before another forum unless an adverse final adjudication is rendered by that forum.<sup>4</sup> Thus, broadcast licensees regularly

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<sup>3</sup>GAF Corporation, 70 RR 2d 1505, 1509-10 (1992) (appeal pending); see generally Memorandum of Understanding, 43 RR 2d 1505 (1978).

<sup>4</sup>Character Qualifications Policy, 69 RR 2d 278, 280 (1991), recon., 71 RR 2d 344 (1992).



report pending claims of discrimination in their renewal applications, which nevertheless are granted without hearing, subject to later FCC action if an adverse final determination is made. The Guild has not shown any reason to treat WNCN differently.

An order by the Commission just last year, involving similar allegations by the Guild, is dispositive here. In 1988 the Guild petitioned the Commission to deny a transfer of control of GAF based upon an unadjudicated claim of age discrimination made by a former employee. On review, the Commission affirmed the Mass Media Bureau's refusal to add an age discrimination issue for hearing, noting that its EEO rules do not specifically include age discrimination and focus largely on systematic practices rather than individual complaints. The Commission also reaffirmed its practice of referring individual complaints to the EEOC rather than itself conducting an investigation in the first instance, recognizing that "[a]s a general matter, the EEOC is far better equipped than this agency to make an informed decision as to whether [the employee's] allegations concerning age discrimination raise issues under the Age Discrimination In Employment Act."<sup>5</sup>

Similarly, the state court in which Field filed his complaint is far better equipped to determine whether a state law violation has occurred than an administrative law judge of the FCC. In the present appeal, the Guild has not only chosen to ignore the Commission's clear statement of policy, it has had the temerity to again raise its claim from 1988, which the Commission has already found does not support addition of an issue! Contrary to the Guild's inference, two unadjudicated allegations of age discrimination made over a five year period do not demonstrate a cognizable pattern of violations.

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<sup>5</sup>GAF Corporation, 70 RR 2d at ¶ 1509-10.

Moreover, the consideration of an EEO issue by the Board would contravene the clear directive of the Hearing Designation Order in this proceeding that all EEO allegations be resolved by the Commission's EEO Branch.<sup>6</sup> Both the Presiding Judge and Review Board have recognized this clear directive in denying another recent request by the Guild for an EEO issue.<sup>7</sup> Thus, the Board has no authority to simultaneously consider allegations concerning WNCN's EEO record. Nor would there be any reason for it to do so, given that the EEO Branch is the expert Branch which normally reviews such allegations, and will do so in any event here. Unfortunately, the Guild has again chosen to ignore clear, recent precedents.

Finally, in addition to all of the procedural and substantive defects listed above, the Guild's request for an EEO issue is based upon the questionable allegations of a disgruntled former employee, who has filed suit challenging the amount of severance payment provided by the terms of his stock subscription agreement. An additional allegation of age discrimination clearly provides him with additional leverage in his monetary claims, especially in light of the fact that he has repeated a claim already made by the Guild (to whom he conveniently sent a copy of his personal press release). With regard to his own termination, Field essentially states that (1) he does not believe he deserved to be terminated and (2) he was 48 and replaced by a man who was 43. The fact that Field feels his termination resulted from age discrimination rather than his performance obviously does

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<sup>6</sup>See GAF Broadcasting Company, Inc., 8 FCC Rcd 1742 (ASD 1993) at n.1.

<sup>7</sup>See Memorandum Opinion and Order, FCC 93M-360, ALJ Chachkin, released June 15, 1993, at ¶ 6; Memorandum Opinion and Order, FCC 93R-50, Rev. Bd, released September 13, 1993 at ¶ 5.

not mean any such violation has occurred. Field was replaced with a man just five years younger. No adjudication has occurred, and GAF intends to vigorously contest this suit. Indeed, GAF has filed a counterclaim against Field for breaching his fiduciary and other obligations to GAF not to engage in conduct detrimental to his employer's interests underlying his employment, among other things, by enriching himself at WNCN's expense.<sup>8</sup> Finally, although Field's declaration references other terminations, he indicates no personal knowledge that these were the result of any improper motivation by GAF.

In any event, however, the Commission need not itself resolve Mr. Field's state law claims or delve into his possible motivations -- under the character policy, the court chosen by Field himself is the proper forum to make such initial determinations regarding alleged non-FCC misconduct. Indeed, Field's suit demonstrates the wisdom of the Commission's policy not to delve into unadjudicated complaints of non-FCC misconduct.

III. There Is No Basis For A "Fraudulent And Deceptive Acts" Issue Based Only Upon Unadjudicated Allegations.

The Guild next seeks an issue to determine whether GAF engaged in "fraudulent and deceptive acts" in violation of federal securities law and other federal and state statutes, again based on Mr. Field's pending suit. Once again, however, Field's allegations are irrelevant and immaterial under the FCC's character policy. Pursuant to that policy, the Commission will consider only: (1) convictions for misconduct constituting a felony (a crime under

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<sup>8</sup>Ironically, although the Guild claims Mr. Field was improperly discharged, it has repeatedly attacked WNCN's performance under his direction as insufficient or in violation of FCC rules. Moreover, the Guild conveniently ignores Field's statement that WNCN has maintained the same format for 16 years, after unsuccessfully alleging that WNCN changed its format during that time.

federal law punishable by death or imprisonment for more than one year); (2) adjudicated fraudulent representations to government units; (3) adjudicated criminal misconduct involving false statements or dishonesty; and (4) mass media-related adjudicated violations of antitrust or other laws dealing with competition.<sup>9</sup>

Field's private suit does not allege any such matter. Rather, he claims:

(1) intentional and malicious interference with prospective contractual and economic advantage; (2) breach of covenant of good faith and fair dealing inherent to the stock subscription agreement; and (3) false representations to induce him to enter the stock subscription agreement. These are state law matters, involving contractual and business relationships. None are felonies, claims of misrepresentation to government units,<sup>10</sup> criminal allegations or antitrust claims. The Guild shamelessly exaggerates Field's state law claims, however, by seeking an issue concerning alleged "federal securities laws" violations. The Guild's reckless hyperbole is unconscionable.

Even if the matters alleged by Field were relevant under the character policy, they would not be cognizable because there has been no adjudication. Pursuant to long-standing practice, and now policy, the Commission has emphatically required that allegations of non-FCC misconduct be adjudicated before considering their possible effect on a licensee's

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<sup>9</sup>Character Qualifications Policy, 67 RR 2d 1107, 1108 & n.2 (1990); recon., 69 RR 2d 278 (1991); further recon., 71 RR 2d 344 (1992).

<sup>10</sup>The Commission recently declined to extend the range of generally relevant misconduct to include adjudicated civil violations involving misrepresentations other than to a governmental unit. Character Qualifications Policy, 69 RR 2d at 280. The Guild declined to seek reconsideration of that decision.

qualifications.<sup>11</sup> Moreover, it recently refused to expand consideration of non-FCC misconduct to unadjudicated allegations, reasoning that:

The Commission generally does not have the expertise or resources to resolve questions of state or federal law outside its principal area of jurisdiction, and it is generally more efficient to allow other forums to resolve such matters and for us to focus on adjudicated misconduct.<sup>12</sup>

The wisdom of this policy is again shown by the Guild's motion. There is no reason for the Commission to adjudicate disputed claims under New Jersey state law simultaneously with a New Jersey state court.

#### IV. No Basis Exists For A Reporting Issue.

On September 29, 1993, GAF voluntarily amended its renewal application to report the following:

On July 22, 1993, the former General Manager of WNCN(FM), Matthew Field, filed a complaint initiating a civil action against GAF, its parent company GAF Corporation, and company officials Samuel Heyman and Carl Eckardt, in the Superior Court of New Jersey for Morris County. This complaint claims, inter alia, that the termination of Mr. Field's employment at WNCN constituted age discrimination in violation of New York and New Jersey law.

GAF intends to deny this charge and contest Mr. Field's claim.

Despite the fact the GAF voluntarily reported Mr. Field's lawsuit, the Guild seeks a Section 1.65 issue, based on the technical claim that this amendment was not filed soon enough. In fact, however, it is readily apparent that Section 1.65 did not even require GAF

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<sup>11</sup>Character Qualifications, 59 RR 2d 801, 819-20 (1986), recon., 61 RR 2d 619 (1986).

<sup>12</sup>Character Qualifications, 69 RR 2d at 280 (emphasis added).

to report an age discrimination lawsuit. As noted above (and in counsel's letter transmitting GAF's amendment), the Commission's broadcast EEO rule does not encompass age discrimination. 47 U.S.C. Sec. 73.2080. Moreover, in WPIX, supra, the Commission concluded that even adjudicated claims of age discrimination would not be cognizable as non-FCC misconduct under the character policy.<sup>13</sup> Nevertheless, out of an abundance of caution and in a forthright demonstration of candor, GAF reported the pending lawsuit although it was technically under no obligation to do so.

Even if Section 1.65 did require the amendment GAF filed, GAF submits that any violation of the rule here was, at most, highly technical and without prejudice. GAF did voluntarily amend its application to report the suit. It did not do so within the 30 days literally required by Section 1.65, but rather within 69 days. The only competing applicant which remained did not claim any prejudice from this short delay. Indeed, on June 23, 1993 -- a month before the suit was even filed -- the parties requested the Commission to approve a settlement agreement and dismiss that applicant. The Guild, never a party to this proceeding, cannot claim prejudice. Moreover, all EEO matters remain pending before the EEO Branch for its consideration, and the Commission will thus clearly have a full opportunity to consider the effect of GAF's amendment.

The Commission has held that a petitioner seeking a reporting issue must make a prima facie showing that: (1) the unreported matter is of decisional significance; (2) an intent to conceal is present; or (3) there has been a pattern of repeated violations reflecting

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<sup>13</sup>Moreover, as noted above, Field's state law claims need not have been reported because they were not material under the FCC character policy.

significant carelessness.<sup>14</sup> The Guild has utterly failed to demonstrate any of these factors; indeed, it has failed to even acknowledge the threshold requirements. Field's complaint is clearly not of decisional significance because no rule violation has been shown and the Commission does not investigate either pending claims of discrimination or unadjudicated non-FCC misconduct in the first instance. This delay will not prevent full consideration of the amendment by the FCC's EEO Branch (which was served with a copy). Moreover, the Guild has shown no other alleged reporting violation, let alone a pattern. Finally, and most importantly, the Guild does not even claim an intent to conceal. Nor is any present, because GAF voluntarily filed an amendment to report Field's suit. An unintentional Section 1.65 violation cannot be disqualifying, and thus cannot support a basic qualifications issue. Thus, in Evergreen Broadcasting Company, 7 FCC Rcd 6601 at ¶ 11 (1992), the Commission refused to remand a comparative proceeding for further hearings on technical violations of Section 1.65, absent any intent to conceal. The Guild's third issue request must also fail.

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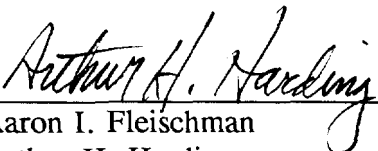
<sup>14</sup>Merrimack Valley Broadcasting, Inc., 57 RR 2d 713, 716 n.9 (1984); Coast TV, 68 RR 2d 972, 976 (Rev. Bd 1990), remanded on other grounds, 71 RR 2d 790 (Rev. Bd 1992).

V. Conclusion.

On September 17, 1993, the Presiding Judge issued an order granting the renewal of WNCN, subject to the pending EEO review. Despite its lack of standing, the Guild now desperately seeks to delay the effectiveness of that grant with meritless issue requests and a brazenly unauthorized appeal. Its efforts to do so must be denied.

Respectfully submitted,

GAF BROADCASTING COMPANY,  
INC.

  
\_\_\_\_\_  
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DATED: October 20, 1993



## CERTIFICATE OF SERVICE

I, Eve J. Lehman, a secretary at the law firm Fleischman and Walsh, hereby certify that I have this 20th day of October, 1993 placed a copy of the foregoing "Opposition To And Motion To Strike Unauthorized Appeal" in U.S. First Class Mail, addressed to the following:

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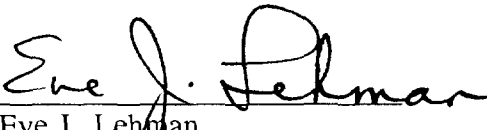
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